Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW Suite 600
Washington, D.C. 20036
(202) 785-0081

Michael F. Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Brian M. Josef
Director, Regulatory Affairs

Its Attorneys

June 20, 2008

TABLE OF CONTENTS

SUMMARY

If the Commission decides not to retain the obligation that the Upper 700 MHz D Block licensee enter into the 700 MHz Public/Private Partnership with the Public Safety Broadband Licensee, CTIA–The Wireless Association® believes that it should adopt market-oriented, flexible-use service rules to govern this spectrum. Doing so would be consistent with past practices that have helped to create a wireless industry that is the most vibrant and competitive sector in the communications arena.

History tells us that the greatest public benefit is produced when marketplace participants are able to freely respond to marketplace demands. If a commercial-only D Block is created, the Commission should allow for an open auction with no restrictions on eligibility, and it should not impose license conditions that favor certain business plans over others. The Commission imposes eligibility restrictions only where open eligibility would pose a significant likelihood of substantial competitive harm, and given how competitive the U.S. wireless market is, there is no basis for the Commission to conclude that any such restrictions are warranted.

Acknowledging the possibility that the "open platform" requirements imposed on licensees in the Upper 700 MHz C Block could have "unanticipated drawbacks," the Commission limited its mandate to that block only. In any event, the kinds of new products and services that an open platform requirement are intended to spur are already being created in the marketplace. Thus, there is no need to impose any such conditions on Upper 700 MHz D Block licenses.

It also would be inappropriate to impose any mandatory wholesale obligation on the D Block licensee because doing so would constitute a use of Commission's service rules to pre-determine licensees' business plans. The Commission's proper role is to create an equitable regulatory environment for wireless services in which market participants are free to decide which business models to pursue, based on market conditions.

Finally, in the event that the Upper 700 MHz D Block is licensed without 700 MHz Public/Private Partnership conditions, the Commission should apply as light a regulatory touch as possible. The Commission should avoid geography-based construction benchmarks that would divert capital from market-dictated uses that would enhance competition. If, however, performance requirements are deemed necessary for this block of spectrum, the Commission should adopt reasonable, population-based construction benchmarks. Geography-based construction requirements force carriers to internally subsidize the deployment of networks in higher-cost areas with revenues from services provided to lower-cost areas, where they are more likely to be subject to competitive pressures. To the extent that the Commission wishes to encourage build-out in rural and underserved areas, it should use its universal service policies to that end.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229
	)	

COMMENTS OF
CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA") hereby respectfully submits comments in response to the Commission's *Second Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

I. INTRODUCTION

CTIA recognizes the Commission's strong interest in pursuing how best to modify the Upper 700 MHz D Block Public/Private Partnership rules to successfully bring about a nationwide, interoperable public safety broadband network. These comments do not take a position on the Public/Private Partnership but instead are directed solely to the questions raised in the *Second Further Notice* on the rules that should apply if the Commission ultimately decides not to retain the Public/Private Partnership obligations.

[1] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band,* Second Further Notice of Proposed Rulemaking, FCC 08-128 (rel. May 14, 2008), 73 FR 29582 (May 21, 2008) ("*Second Further Notice*").

As the Commission is well aware, public safety agencies across the nation currently rely on commercial wireless networks for vital communications. CTIA believes that the public interest is well served when market-driven solutions govern such arrangements. As discussed below, if the contemplated 700 MHz Public/Private Partnership does not come into being, the Commission should (1) employ market-oriented, flexible-use service rules for the D Block, (2) refrain from mandating any particular business model for use in this block, (3) allow all prospective bidders to compete for the D Block spectrum (*i.e.*, adopt no eligibility restrictions), and (4) adopt reasonable performance requirements for the D Block.

II. IN THE EVENT THAT THE D BLOCK IS NOT LICENSED PURSUANT TO PUBLIC/ PRIVATE PARTNERSHIP REQUIREMENTS, THE COMMISSION SHOULD LICENSE THE D BLOCK USING FLEXIBLE-USE, MARKET-ORIENTED SERVICE RULES.

Though the bulk of the *Second Further Notice* is devoted to issues relating to the contemplated Public/Private Partnership, the Commission also raises the possibility that the Public/Private Partnership may not ultimately be created.[2] If such a result were to come about, CTIA urges the Commission to base its service rules for an unrestricted commercial D Block on the same market-oriented, flexible-use service rule model that the Commission has so successfully employed in helping create today's highly-competitive commercial wireless marketplace. Except as necessary to protect against harmful interference, the Commission should allow marketplace forces to determine the highest and best use of this spectrum.

[2] *Second Further Notice* at ¶ 191 (noting that the Public/Private Partnership would not come into being if "the license again fails to attract a winning bidder, or the winning bidder defaults or fails to negotiate a successful NSA with the Public Safety Broadband Licensee" or if the Commission "decide[s] not to retain the 700 MHz Public/Private Partnership condition").

The recent history of the wireless industry shows that consumers receive the greatest benefit when this path is followed:

- In the last six calendar years, wireless service providers in the U.S. have made over $120 billion of incremental capital investments (N.B. this figure does not include spectrum acquisition costs, whether acquired through the FCC auctions or through private market transactions).[3]

- Since 2002, the number of U.S. mobile telephone subscribers has increased by well over 100 million to approximately 260 million.[4]

- U.S. wireless subscribers are increasing their wireless usage while the costs of doing so have declined. The average number of wireless voice minutes used per subscriber per month grew from 427 in 2002 to 812 in 2007, while the average revenue per minute declined from $0.11 to $0.06.[5]

- As the Commission recently summed up, "U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the Commercial Mobile Radio Services ("CMRS") marketplace . . . ."[6]

In light of this thriving and innovative wireless environment, it would be unwise for the Commission to micromanage the dynamics of the marketplace by imposing service rules on the Upper 700 MHz D Block that dictate the types of services licensees can provide. If the Commission conducts a commercial-only D Block auction, it should expeditiously license the D Block spectrum using service rules that are faithful to its tried-and-true flexible-use policy while protecting against harmful interference.

---

[3] *See CTIA's Wireless Industry Indices, Semi-Annual Data Survey Results: A Comprehensive Report From CTIA Analyzing the U.S. Wireless Industry, Year-End 2007 Results*, released May 2008, at p.124.

[4] Glen Campbell, et al., "Global Wireless Matrix 2Q07," Merrill Lynch, Oct. 4, 2007, at Table 1.

[5] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twelfth Report, 23 FCC Rcd 2241, 2246-2247 (2008) ("*Twelfth CMRS Competition Report*"); *Glen* Campbell, et al., "Global Wireless Matrix 4Q07," Merrill Lynch, April 21, 2008, at Table 1.

[6] *Twelfth CMRS Competition Report* at ¶ 1.

III. THE COMMISSION SHOULD REFRAIN FROM MANDATING PARTICULAR BUSINESS MODELS IN THE UPPER 700 MHZ D BLOCK.

Success in the wireless marketplace ought to depend on market participants' ability to execute on good business plans and respond well to consumers' demands, and not on whether their business model is favored by the government. Put simply, government spectrum policy should not prefer some business plans over others. CTIA therefore opposes adoption of any open platform or wholesale service requirement for the D Block.

A. No Open Platform Requirement Should Be Adopted for the Upper 700 MHz D Block.

The *Second Further Notice* asks whether, in a D Block not subject to Public/Private Partnership requirements, it would "serve the public interest to impose . . . open platform conditions similar to those imposed on the adjacent C Block."[7] CTIA opposes any such requirements. They are both unnecessary and unwise.

An Open Platform Mandate Is Unnecessary in the Upper 700 MHz D Block. The market for open platforms, devices and applications was emerging well before the recent auction of the Upper 700 MHz C Block. For example, since April 1, 2005 Alltel has allowed customers to activate their own CDMA equipment on the Alltel network without a contract requirement.

Wireless consumers also have been able to run software applications of their choosing and have been doing so for quite some time. Existing wireless platforms offer consumers the ability to download, install and run compatible applications of their choosing. Most notable is the increasing prevalence of Windows Mobile as a platform for "Pocket PCs" and "Smartphones." For example, Skype and a host of other applications are capable of running on

[7] *Second Further Notice* at ¶ 205.

these handsets utilizing Windows Mobile.[8] Carriers have been involved in enabling this independent software development, with AT&T being the first major wireless carrier to launch an application developer program in 2001.

More recently, in November 2007 the Open Handset Alliance ("OHA") announced the Android™ project, an open source mobile platform that will create additional opportunities in the mobile marketplace. OHA includes mobile carriers from around the world (including Sprint Nextel and T-Mobile), as well as many leading handset manufacturers, software developers and semiconductor companies. OHA has plans to commercially deploy handsets and services using this new platform by the end of 2008.[9] This work is an excellent example of marketplace participants coming together to respond to marketplace forces by developing new products and services, all without need for any regulatory intervention.

Separately, in late November 2007 Verizon Wireless also announced that it would, by the end of 2008, provide all customers on its nationwide wireless network the option to use wireless devices, software and applications not offered by the company.[10] Seeing the marketplace potential of this additional retail option, Verizon Wireless CEO Lowell McAdam said at the time

---

[8] Developers are free to write programs to run on Windows Mobile handsets using Microsoft's Windows Mobile Development Kit, which allows programmers to use the existing Windows Mobile Application Programming Interface ("API") to develop applications for this mobile operating system. *See* "Windows Mobile for Developers," Microsoft Developers Network, *available at* http://www.microsoft.com/windowsmobile/developers/default.mspx (last accessed June 20, 2008). *See also* "Visual Studio: Learn More," *available at* http://msdn2.microsoft.com/en-us/vstudio/aa973782.aspx (containing a partial list of the available programming languages available under Visual Studio) (last accessed June 20, 2008).

[9] *See* www.openhandsetalliance.com.

[10] *See* Press Release, *Verizon Wireless To Introduce 'Any Apps, Any Device' Option For Customers In 2008*, available at http://news.vzw.com/news/2007/11/pr2007-11-27.html. Verizon Wireless was the winning bidder for most of the open platform-conditioned Upper 700 MHz C Block licenses auctioned in FCC Auction 73, but the company's November 2007 commitment was not limited to the 700 MHz spectrum.

that the company was responding to the desires of a small but growing number of customers who were "looking for a different wireless experience."[11]

These developments are a testament to the fact that consumer benefit is best achieved by allowing competitive market forces to operate freely. Under these circumstances, there is certainly no need to impose an open platform mandate in a commercial D Block.

Extending the C Block Open Platform Mandate to the D Block Would be Unwise. Less than a year ago in its 700 MHz *Second Report and Order*, the Commission adopted an open platform requirement for the Upper 700 MHz C Block, requiring that licensees allow customers, device manufacturers, third-party application developers and others to use or develop the devices and applications of their choice, subject to certain conditions.[12] At the same time, however, the Commission determined that the public interest would be disserved by extending the mandate beyond the Upper 700 MHz C Block. The Commission acknowledged that this new paradigm "may have unanticipated drawbacks" and therefore imposed the open platform requirement "only on a limited basis" so as to "allow both the Commission and industry to observe [its] real-world effects."[13] Services using the open platform mandated for the Upper 700 MHz C Block have not yet been initiated, so there is no reason for the Commission to revisit its conclusion to limit the open platform mandate to the Upper 700 MHz C Block.

Moreover, imposing open platform requirements on the D Block would undercut the fundamental premise of the Commission's competitive bidding program since its inception – *i.e.*, that bidders who value the spectrum most highly likely will make the most efficient use of it – and would surely reduce the spectrum's value at auction, depriving the public of the true value of

[11] *Id*.

[12] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al*., Second Report and Order, 22 FCC Rcd 15289 ¶¶ 189-230 (2007) ("*700 MHz Second Report and Order*").

[13] *Id*. at ¶ 205.

this unique spectrum resource. The results of FCC Auction No. 73 – where the average price (per MHz/pop) of the open platform-conditioned Upper 700 MHz C Block spectrum was $0.76 compared with $1.16 and $2.68 for the Lower 700 MHz A and B Blocks, respectively – suggest that the costs of complying with the open platform mandate were among the factors that affected the relative spectrum valuations.

B. The Commission Should Not Adopt a Mandatory Wholesale Obligation in the D Block.

The *Second Further Notice* also asks whether the Commission should "consider imposing a mandatory wholesale obligation" in the event that the Upper 700 MHz D Block is auctioned without a Public/Private Partnership condition.[14] There are several reasons for the Commission to refrain from imposing a mandatory wholesale obligation, but one basic principle should be paramount: It is inappropriate for the Commission to use its service rules as a mechanism to predetermine the D Block licensee's business plan.

As discussed above, the government is ill-equipped to predict the needs of the wireless marketplace. The Commission should therefore create an equitable regulatory environment for wireless services that leaves to market participants and their customers the decisions as to which business models to pursue. Indeed, this is exactly what the Commission decided in rejecting a mandatory wholesale obligation in the *700 MHz Second Report and Order*. The Commission rejected arguments that such an obligation was necessary to "level the playing field" or to provide incentives for new entry and innovation, noting that "[t]he Commission has historically required that, to the extent practical, technical and operational rules should be comparable for

[14] *Second Further Notice* at ¶ 205.

CMRS services."[15] Imposing a mandatory wholesale obligation on a commercial-only D Block would contravene this principle.

Indeed, the objective evidence shows that there is no need for adoption of a wholesale mandate in the D Block. Since the sunset of the mandatory resale rule, the opportunities for mobile virtual network operators ("MVNOs") have risen. The Commission recently cited reports of over 50 MVNOs offering wireless services to consumers.[16] The success in the marketplace of all wireless service providers – facilities-based providers and MVNOs alike – should depend on whether market participants are able to execute on good business plans, not on whether the Commission mandates their existence.

Finally, a wholesale service obligation imposed on a commercial D Block licensee would undercut the Commission's clearly expressed policy of encouraging facilities-based competition among providers of service to the public.[17]

IV. THE COMMISSION SHOULD REJECT RESTRICTIONS ON ELIGIBILITY TO ACQUIRE UPPER 700 MHZ D BLOCK LICENSES.

The *Second Further Notice* asks whether it would "serve the public interest to impose any eligibility restrictions" on D Block spectrum in the event that the block is licensed without mandatory Public/Private Partnership conditions.[18] The Commission recently considered and rejected any such restrictions, and it should do so again here.

---

[15] *700 MHz Second Report and Order* at n. 469.

[16] *See Twelfth CMRS Competition Report* at ¶ 22.

[17] Additionally, a wholesale mandate would undercut the Commission's "designated entity" ("DE") policies, which are aimed at encouraging small business provision of facilities-based competition to the public. The Commission waived its DE restrictions on lease and resale for the D Block in Auction No. 73 "unique regulations governing" the 700 MHz Public/Private Partnership. *See Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules for the Upper 700 MHz Band D Block License*, Order, 22 FCC Rcd 20354 (2007). If the Commission decides not to apply those "unique regulations" to the D Block, the basis on which the D Block waiver was granted would evaporate.

[18] *Second Further Notice* at ¶ 205.

In its *700 MHz Second Report and Order*, the Commission analyzed "whether open eligibility would pose a significant likelihood of substantial competitive harm in the broadband services market,"[19] and gave several reasons for rejecting eligibility restrictions. Its analysis has continuing validity today:

> *The high number of existing competitors deters anticompetitive behavior*: "Given the number of actual wireless providers and potential broadband competitors, it is unlikely that ILECs, cable providers, or large wireless carriers would be able to behave in an anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum."[20]
>
> *New competitors are able to gain entry into the market*: "Given the number and diversity of available licenses, it is unlikely that any ILEC, cable company, or large wireless carrier would be able to acquire enough spectrum to foreclose the broadband market to potential competitors, even if it should attempt to do so."[21]
>
> *Open eligibility has benefits*: "There are potential competitive benefits to not imposing the proposed eligibility requirement."[22]
>
> *Eligibility restrictions deter broadband deployment*: "[T]he proposed eligibility restriction would create impediments to small and rural carrier acquisition of spectrum and deployment of broadband services."[23]
>
> *Eligibility restrictions threaten spectrum efficiency*: "[R]estricting eligibility for licenses without adequate justification could harm the public interest. . . . The use of competitive bidding to assign licenses, such as the commercial 700 MHz licenses, serves the public interest by assigning licenses to the parties that value the licenses the most. Such parties are presumed to be most likely to put the public spectrum resource to its most effective use. If, however, we exclude categories of potential licensees, we risk reducing the likelihood that the party valuing the license the most will win the license and put it to use for the benefit of the public."[24]

[19] *700 MHz Second Report and Order* at ¶ 256.

[20] *Id*.

[21] *Id*. at ¶ 257.

[22] *Id*. at ¶ 258.

[23] *Id*.

[24] Id. at ¶ 259.

As noted above, the Commission imposes eligibility restrictions only where open eligibility would pose a significant likelihood of substantial competitive harm, and there is no basis for the Commission to conclude that any such harm would result from open eligibility for D Block spectrum. Indeed, the opposite is the case.

The wireless marketplace in the United States is the world's most competitive, leading in number of wireless subscribers, number of minutes of use, lowest cost per minute of use, number of carriers with more than one million subscribers, and subscribers served per MHz of spectrum. Only in the United Kingdom do the top two carriers have a slightly smaller share of the total market.[25] As the Commission recognized in the *Twelfth CMRS Competition Report*, the market for wireless services in the United States has become more competitive recently.[26] Moreover, wireless carriers already are providing broadband offerings that compete with cable modem and DSL services. In today's highly competitive wireless market, restricting eligibility to acquire commercial D Block spectrum simply cannot be justified.

We note that the *Second Further Notice* also asks whether the Commission should limit eligibility for the D Block in the context of an auction that includes mandatory Public/Private Partnership conditions. For the same reasons as stated above, this would be an ill-advised course. Further, a D Block re-auction with Public/Private Partnership conditions is most likely to succeed if the Commission retains a policy of open eligibility.

---

[25] *See* Written Ex Parte Communication, WT Docket Nos. 07-71 and 05-194, Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA – The Wireless Association®, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 8, 2008).

[26] *See Twelfth CMRS Competition Report* at ¶ 291 (concluding that "competition in mobile telecommunications markets is flourishing", noting "a sixteen percent increase in the percentage of the U.S. population living in counties with access to five or more different mobile telephone operators, from nearly 51 percent at the end of 2005 to 59 percent at the end of 2006", and observing that "nearly 94 percent of the U.S. population continues to live in counties with four or more mobile telephone operators competing to offer service").

V. THE COMMISSION SHOULD ADOPT REASONABLE PERFORMANCE REQUIREMENTS FOR THE COMMERCIAL D BLOCK SPECTRUM, IF ANY.

CTIA shares the Commission's desire for widespread provision of mobile wireless services, and strongly believes that decisions on capital investment in construction should be driven primarily by marketplace demand and not by regulatory fiat. Therefore, to the extent that the Commission determines that construction requirements are needed in a commercial D Block, it should adopt reasonable, population-based benchmarks.

By its very nature, a requirement that a licensee construct facilities to serve a particular geographic area, regardless of the demand for service present in that area, runs counter to the concept of allowing market demands to dictate investment. Such a requirement would force licensees to make investments in facilities that are not demand-driven, leading to uneconomic build-out and diverting capital from market-dictated uses that would benefit consumers.

The Commission has acknowledged that certain rural areas "are very difficult to serve because of high equipment costs, low population density, or other economic factors."[27] To the extent government policy should be used to address this issue, the preferred vehicle should be the Commission's universal service policies, and not adoption of uneconomic geography-based build-out requirements.[28] Indeed, geography-based construction requirements force carriers to internally subsidize the deployment of networks in less profitable, higher-cost areas with revenues from services provided in more profitable, lower-cost areas, where they are more likely

[27] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al*., Notice of Proposed Rulemaking, 21 FCC Rcd 9345, 9362 (2006) (quoting *Rural Wireless Report and Order*, 19 FCC Rcd at 19089).

[28] The Commission has the discretion, where appropriate, to direct explicit universal service subsidies to facilitate deployment of wireless networks in areas presenting particular economic challenges, and there are numerous examples of universal service being used to extend networks to areas that would be bypassed without access to universal service support. *See, e.g.*, Written Testimony of Paul W. Garnett, Assistant Vice President, Regulatory Affairs, CTIA-The Wireless Association® before the United States Senate Committee on Commerce, Science and Transportation, February 28, 2006, at 11.

to be subject to competitive pressures. This process undermines the economically efficient development of competition and runs counter to section 254(e) of the Act.[29]

For all these reasons, any build-out requirements imposed on licensees of commercial-only D Block spectrum should be reasonable, population-based requirements.

VI. CONCLUSION

For the reasons discussed above, if the Commission determines not to license the Upper 700 MHz D Block subject to Public/Private Partnership requirements, it should adopt straightforward, market-oriented, flexible-use service rules for the D Block, refrain from mandating open platforms for devices and applications or wholesale service obligations, reject any restrictions on eligibility, allowing all prospective bidders to compete for the D Block spectrum, and if performance requirement are deemed necessary, adopt reasonable, population-based construction benchmarks for the D Block.

Respectfully submitted,

/s/ Brian M. Josef

Brian M. Josef
Director, Regulatory Affairs

Michael F. Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

CTIA-THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, D.C. 20036
(202) 785-0081

June 20, 2008

[29] *See* 47 U.S.C. § 254(e); *see also COMSAT Corp. v. FCC*, 250 F.3d 931, 938-40 (5th Cir. 2001) (the Commission can neither require implicit subsidies nor permit them).